RECENT CASES

Bankruptcy—Section 77B—Constitutionality of Subsection (b) (5) of Section 77B of Bankruptcy Act—Debtor corporation, having been in receivership for two years, immediately prior to the final hearing at which an order for the sale of assets and the termination of the receivership was expected, filed a petition [1] under section 77B [2] of the Bankruptcy Act and submitted three plans of reorganization which were opposed by all the secured creditors and by a large part of the unsecured. The debtor finally sought to obtain confirmation of the last plan under subsections (e) (1) (c) [3] and (b) (5) [4] providing for confirmation despite the disapproval of more than one-third of a class of affected creditors. *Held,* subsection (b) (5) was unconstitutional,[5] because it violated the Fifth Amendment by taking property without due process of law.[6] In re *Tennessee Publishing Co.,* C. C. H. Bankruptcy Service § 3834 (C. C. A. 6th, Feb. 13, 1936).

The problem of the constitutionality of subsection (b) (5) of § 77B [7] may arise in either of two situations, the instant case representing the one in

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1. The petition was instigated by an individual who had that day secured control of the corporation by purchasing all of the common stock at a time when it seemed doubtful whether the shareholders had any equities left.

2. 48 STAT. 912 (1934), 11 U. S. C. A. § 207 (1935).

3. 48 STAT. 918 (1934) as amended by 49 STAT. 965, 11 U. S. C. A. § 207 (e) (1935). (e) (1) "A plan of reorganization shall not be confirmed until it has been accepted . . . by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims have been allowed and would be affected by the plan . . . *Provided, however,* That such acceptance shall not be requisite to the confirmation of the plan by any creditor or class of creditors . . . (c) if provision is made in the plan for the protection of the interests, claims, or liens of such creditor or class of creditors in the manner provided in subdivision (b), clause (5), of this section. . . ."

4. 48 STAT. 914 (1934), 11 U. S. C. A. 207 (b) (1935). (b) "A plan of reorganization within the meaning of this section . . . (5) shall provide in respect of each class of creditors of which less than two-thirds in amount shall accept such plan . . . adequate protection for the realization by them of the value of their interests, claims, or liens, if the property affected by such interests, claims, or liens is dealt with by the plan, either as provided in the plan (a) by the transfer or sale of . . . or by the retention of such property by the debtor subject to such interests, claims, or lien; or (b) by a sale free of such interests, claims, or liens at not less than a fair upset price and the transfer of such interests, claims, or liens to the proceeds of such sale; or (c) by appraisal and payment either in cash of the value either of such interests, claims, or liens, or at the objecting creditors' election, of the securities allotted to such interests, claims, or liens under the plan, if any shall be so allotted; or (d) by such method as will in the opinion of the judge, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection . . . "

5. Although the court began by saying that under the proposed plan it was concerned only with clauses (c) and (d) of (b) (5) and although its discussion seemed to be limited to these provisions, it, nevertheless, broadly concluded that (b) (5) was unconstitutional as a whole.

6. The court apparently considered itself bound by the Supreme Court decision holding the Frazier-Lemke Act unconstitutional. Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555 (1935). That decision reversed the holding of the instant circuit court in the same case. Louisville Joint Stock Land Bank v. Radford, 74 F. (2d) 576 (C. C. A. 6th, 1935).

7. That section 77B in its general scope represents a constitutional exercise of the bankruptcy power of Congress has not been seriously disputed. Campbell v. Allegheny Corp., 75 F. (2d) 947 (C. C. A. 4th, 1935), *cert. denied* 56 Sup. Ct. 92 (1935). It is essentially the same as section 77 [47 STAT. 1474 (1933), amended by 49 STAT. 911, 11 U. S. C. A. § 205 (1935)], which has been approved by the Supreme Court. Continental Illinois Nat. Bank & Trust Co. v. Chicago, R. I. & P. Ry., 294 U. S. 648 (1935). Legal writers have generally given their approval. See Swaine, *Federal Legislation for Corporate Reorganiza-*

which the minor creditor classes or the shareholders attempt to have a plan of reorganization confirmed without the consent of the major creditor interests. In the second, the important classes of creditors are interested in adopting a plan to which the consent of the requisite two-thirds of certain subordinate classes can not be obtained. Subsection (b) (5) was probably not intended to apply to cases falling in the former category [8] and should have been so interpreted in this case. The court might either have refused to recognize the proposal advanced as a plan of reorganization at all, or have treated it as one that was not feasible, in which case the right to file the petition could have been denied [9] because one element of the good faith requirement [10] of the Act is the proof that reorganization is practicable, so that the court will not unnecessarily occupy itself with a consideration of the plan.[11] Even if a petition had been granted and such a plan were subsequently evolved, the proceedings could then have been dismissed if the court thought that a fair, equitable and workable plan was unlikely to be forthcoming.[12] However, in the second situation, where (b) (5) is applicable, serious constitutional questions do present themselves. Little objection can be found to the protection accorded subordinate classes under clauses (a) and (b) of the disputed subsection. Under them the rights of the creditors are fully protected, and the possible delay in enforcement pending reorganization should not render the law unconstitutional.[13] Clause (d) is probably so vague as to be impossible of application and therefore inoperative, or else limited to the previous specific provisions.[14] Of chief concern is the important provision for appraisal in part (c). Important practical considerations can be invoked in favor of preventing subordinate creditors, merely because they represent all or a majority of some relatively unimportant class, from halting an entire reorganization program and blackmailing the reorganizers into purchasing the compliance of the dissidents or into buying them out at a price representing their nuisance value in addition to the fair value of their interests.[15] On the other hand, the proposition that possible majorities can be appraised and their power to participate in the reorganization thus destroyed is a novel one in the law,[16] and since well established property rights [17] will be affected in an

tion: An Affirmative View, (1933) 19 A. B. A. J. 698; Weiner, *Corporate Reorganization: Section 77B of the Bankruptcy Act,* (1934) 34 COL. L. REV. 1173; Gerdes, *Constitutionality of 77B of the Bankruptcy Act,* (1934) 12 N. Y. U. L. Q. REV. 196. For the contrary position, see Stebbins, *Constitutionality of the Recent Bankruptcy Law* (1933) 17 MARQ. L. REV. 163.

8. *In re* Murel Holding Co., 75 F. (2d) 941 (C. C. A. 2d, 1935); *In re* Preble Corp., 12 F. Supp. 1002 (D. Me. 1935).

9. The court in the instant case declared that the right to file the petition might have been denied, and that the lower court had erred in holding that good faith was merely a question of honest intention, because good faith should be determined by the feasibility of the plan and the reasonableness of the expectation of a successful rehabilitation. However, the court, for other reasons, felt obliged to rule on the constitutional question.

10. § 77B (a). 48 STAT. 912 (1934), 11 U. S. C. A. § 207 (a) (1935).

11. Manati Sugar Co. v. Mock, 75 F. (2d) 284 (C. C. A. 2d, 1935); *In re* Texas Gas Utilities Co., C. C. H. Bankruptcy Service § 3014 (S. D. Tex. 1934); *In re* Hotel Park Central Inc., C. C. H. Bankruptcy Service § 3545 (S. D. N. Y. 1935)

12. *In re* 235 W. 46th Street Co., 74 F. (2d) 700 (C. C. A. 2d, 1935).

13. Continental Illinois Nat. Bank & Trust Co. v. Chicago, R. I. & P. Ry., 294 U. S. 648 (1935); see Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 583 (1935).

14. See *In re* Murel Holding Corp., 75 F. (2d) 941, 942 (C. C. A. 2d, 1935).

15. See Swaine, *Corporate Reorganization under Federal Bankruptcy Power* (1933) 19 VA. L. REV. 317; Foster, *Conflicting Ideals for Reorganization* (1935) 44 YALE L. J. 923. The almost insurmountable difficulties encountered by railroad reorganizers in obtaining the consent of two-thirds of all classes has been effectively brought out in Congressional hearings. See *Hearings before the Committee on Judiciary, House of Representatives, on H. R. 6249, Ser. 3,* 74th Cong., 1st Sess. (1935).

16. Compositions, however, have affected rights of dissenting creditors, and this fact has been advanced in support of the provisions of section 77B, since the constitutionality of

unusual manner, it is not improbable that the Supreme Court will hold this to be so arbitrary an exercise of the bankruptcy power as to be lacking in due process.[18]

Bankruptcy—Section 77B—Foreclosure Receivership for Collection of Rents and Profits as Prior Equity Receivership—A corporation owned and mortgaged a large hotel. The mortgagee instituted foreclosure proceedings and procured appointment of a receiver for the rents and profits. Creditors of the corporation subsequently filed a petition under Section 77B of the Bankruptcy Act,[1] alleging the corporation's inability to pay its debts as they matured. These creditors relied on the above receivership to bring them within the terms of Section 77B (a), which provides, in effect, that if a "prior proceeding in . . . equity receivership" is pending against the debtor, petitioners are relieved of the necessity of proving an act of bankruptcy within the preceding four months.[2] *Held,* petition dismissed, since this receivership was not such a "prior equity receivership" as was contemplated by the Section. *Duparquet Huot & Moneuse Co. v. Evans,* 56 Sup. Ct. 412 (1936); *Tuttle v. Harris,* 56 Sup. Ct. 416 (1936).

The instant decisions clearly settle a phase of bankruptcy law which had been the subject of conflicting adjudications in the lower federal courts,[3] by

sections 12 and 74 of the Bankruptcy Act [30 STAT. 549 (1898), 36 STAT. 839 (1910), 11 U. S. C. A. § 30 (1927); 47 STAT. 1467 (1933), amended by 48 STAT. 922 (1934), 49 STAT. 246, 11 U. C. C. A. § 202 (1935)], providing for compositions, has been upheld. Compositions have been rationalized as voluntary contracts between the debtor and his creditors, the will of the majority of the creditors binding the dissenters. Cumberland Glass Mfg. Co. v. De Witt & Co., 237 U. S. 447 (1915); Myers v. International Trust Co., 273 U. S. 380 (1927). This theory is inapplicable, however, when an attempt is made to bind dissenting majorities. Compositions, moreover, do not afford an entirely valid analogy, because section 12 deals only with unsecured claims and section 74, dealing with secured claims, only allows a delay in the remedy, and prohibits any impairment of a lien. Statutes providing for appraisal of dissenting shareholders' interests in corporations when it is proposed to merge, sell the entire business, etc., require agreement by a certain majority of all the shareholders, but are silent as to the necessity for approval by a majority of each class, and courts have seldom dealt with the problem. See Lattin, *Remedies of Dissenting Shareholders under Appraisal Statutes* (1931) 45 HARV. L. REV. 233. The only case found held that approval by the statutory majority did not mean a majority of each class. Haggard v. Lexington Utilities Co., 260 Ky. 261, 84 S. W. (2d) 84 (1935). There was no evidence, however, that the interests of the classes were materially adverse.

17. See the rights enumerated in Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 594-595 (1935). The secured creditor has always had the right to foreclose and have a sale of the property at which he could protect his interest by bidding and thus obtaining either what he considered to be the value of his interest, or the property itself. The great value of the property involved in equity receiverships has made this right of little practical worth there, because it has been recognized that dissenters could not hope to compete in the bidding and must depend on the court's protection of their interests by setting a fair upset price. The argument that there will be no substantial difference in appraisals overlooks the fact that the right to foreclose and bid may be of great importance under section 77B, which extends to small corporations the advantages of reorganization, and in this field the value of the property is not so high as to prevent dissenters from being able, practically, to bid.

18. It has sometimes been argued that the Fifth Amendment is not a limitation on the bankruptcy power. See Gerdes, *Constitutionality of 77B of the Bankruptcy Act* (1934) 12 N. Y. U. L. Q. REV. 196, 207. If this view ever had any foundation, it has been unequivocally repudiated by the Supreme Court in the recent case of Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555 (1935).

1. 48 STAT. 911 (1934), 11 U. S. C. A. § 207 (Supp. 1935).

2. For a comment on the difficulty of proving an act of bankruptcy, see Fried, *The Effect of Section 77B on Real Estate Reorganizations* (1935) 4 BROOKLYN L. REV. 318, 325.

3. *In re* 2168 Broadway Corp., 78 F. (2d) 678 (C. C. A. 2d, 1935), aff'd by the instant case, Duparquet Huot & Moneuse Co. v. Evans, 56 Sup. Ct. 412 (1936); *In re* Allen, 78 F. (2d) 680 (C. C. A. 2d, 1935); *In re* Draco Realty Corp., 11 F. Supp. 405 (S. D. N. Y. 1935). *Contra: In re* Granada Hotel Corp., 78 F. (2d) 409 (C. C. A. 7th, 1935), rev'd by

determining that Section 77B refers to a *general* equity receivership only—the so-called "conservation suit" on a creditors' bill[4]—rather than to a particular receivership incident to a mortgage foreclosure. Adopting the interpretation here embraced seems the more desirable course, for the fact that companies indebted exclusively on a mortgage are hereby denied the benefits of bankruptcy administration is overbalanced by the consideration that such administration is rarely more efficient or more necessary for purposes of such a company than that of the state court's receiver. This is due to the fact that foreclosure proceedings commonly concern real estate corporations with holdings limited to one building or to a few, which are almost always in one state,[5] so that ancillary administration and similar difficulties are not matters of concern. Furthermore, as was pointed out by Mr. Justice Cardozo in the *Duparquet* case,[6] the historical background of the Section demonstrates that the result actually attained is probably the most representative of the meaning which Congress intended to attach to the term "equity receivership." Additional support for this conclusion is marshalled by the justice's examination of subdivision (i),[7] which involves the bankruptcy court's power to take control of property included under a receivership (the "supersession of jurisdiction" doctrine),[8] and which, likewise, was said by the Court to be inapplicable to receivers in foreclosure; hence preexisting precedents were said not to be invalidated by the subsection. Subdivision (i), however, was not justiciable in the present action, and omitting discussion of it would not have affected the outcome. While, therefore, the Court is not irrevocably bound by its decision, nevertheless the implications of a *dictum* so strong are not to be ignored. Of course it is broadly true, as was noted in the opinion in the *Duparquet* case,[9] that though an equity receiver must yield to an ordinary trustee in bankruptcy,[10] even such a trustee may not override valid "liens." [11] But Section 77B contains various provisions for *impairing* those liens,[12] and it would not seem inevitable that the Section effects no change in the law. Subsidiary matters, moreover, suggest themselves. For example, does a consent receivership create such a "lien" that under some circumstances it may not be superseded by a bankruptcy court? [13] And is it material in this

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the instant case, Tuttle v. Harris, 56 Sup. Ct. 416 (1936); *In re* Prairie Ave. Bldg. Corp., 11 F. Supp. 125 (E. D. Ill. 1935).

4. See *In re* 2168 Broadway Corp., 78 F. (2d) 678, 679 (C. C. A. 2d, 1935), cited *supra* note 3.

5. See, *e. g.*, cases cited *supra* note 3.

6. 56 Sup. Ct. 412, 413, 414 (1936).

7. 48 STAT. 911, 920 (1934), 11 U. S. C. A. § 207 (i) (Supp. 1935). The relevant wording is as follows: "If a receiver or trustee of all or any part of the property of a corporation has been appointed . . a petition . . . may be filed under this section at any time thereafter by the corporation, or its creditors . . . and if such petition . . . is approved, the trustee or trustees appointed under this section . . . shall be entitled forthwith to possession of and vested with title to such property. . . ."

8. See GLENN, LIQUIDATION (1935) §§ 225, 226.

9. 56 Sup. Ct. 412, 415 (1936).

10. Gross v. Irving Trust Co., 289 U. S. 342 (1933); *cf. In re* Manbeach Realty Corp., 10 F. Supp. 523 (E. D. N. Y. 1935).

11. Metcalf v. Barker, 187 U. S. 165 (1902) (judgment); Straton v. New, 283 U. S. 318 (1931) (judgment); Russell v. Edmondson, 50 F. (2d) 175 (C. C. A. 5th, 1931) (mortgage).

12. See opinion in Duparquet case, 56 Sup. Ct. 412, 415 (1936), remarking that under subsections (b), (c), (10), (e), (f), and (h), "the suit for the foreclosure of the mortgage may be stayed or enjoined upon a showing of necessity . . .; the lien may be transferred to the proceeds of a sale . . .; at times the holder of the lien may have his security modified or reduced by the plan of reorganization when finally approved . . . ."

13. *Cf.* Clements v. Conyers, 32 F. (2d) 5 (C. C. A. 7th, 1929), *cert. denied* 280 U. S. 584 (1929); GLENN, LIQUIDATION (1935) § 242; Jagow, *The Fourth Act of Bankruptcy* (1935) 10 WIS. L. REV. 479, 487.

connection that a period of four months has elapsed?[14] The Court has not yet passed upon these questions and others germane to them, but the *dictum* in the *Duparquet* case may be an important indication of the direction to be taken when they really do arise.

Constitutional Law—Arbitrary Valuation for Tax Purposes by State Board of Equalization as a Violation of Due Process—Complainant railway, alleging that its property had been overvalued by the State Board of Equalization, sought an injunction in a federal court against collection of 1933 property taxes. The Board had fixed the tax value for 1932 by averaging (1) the stock and bond prices of the railroad and (2) the capitalized net income earned at a fair rate of return, each average being computed from the figures for the five years prior to the 1932 assessment, and then averaging the two composite figures.[1] The assessment for 1933 was the same as that for 1932, which, in turn, was only slightly below the 1929 assessment.[2] There was no recognized formula for finding system value which would have approximated the figure reached by the Board as the 1933 assessment.[3] The railway company did not allege that the valuation discriminated against it in favor of other property owners, and, apparently, the Board merely was continuing the old assessments throughout the state. *Held* (Stone, Brandeis and Cardozo, JJ., dissenting), that only that part of the tax which was based upon not more than 87 *per cent.* of the assessment could be properly collected, since the valuation was "arbitrary" and "excessive" in overlooking the enormous decline in the value of securities and railroad earnings caused by the economic depression,[4] and hence deprived the petitioner of property without due process of law. *Great Northern Railway v. Weeks*, 56 Sup. Ct. 426 (1936).

For the first time in its history, the Supreme Court has held that what the Court will call an excessive valuation for tax purposes by a state taxing body is a violation of due process. This decision, unfortunately, appears to furnish the basis for a flood of litigation by any taxpayers who may be dissatisfied with the exercise of discretion by administrative officials. The case can have no other significance, for, as the railway property was not assessed differently from that

14. *Cf.* Straton v. New, 283 U. S. 318 (1931); Gross v. Irving Trust Co., 289 U. S. 342 (1933); GLENN, LIQUIDATION (1935) § 228.

1. The railroad contended also that the method of assigning a proportion of system value to the state resulted in the taxation of property outside the state and therefore interfered with interstate commerce, but the Court rejected this contention. The Supreme Court has enjoined collection of a tax computed on a basis which reaches out of state property. Fargo v. Hart, 193 U. S. 490 (1904); *cf.* Rowley v. Chicago & N. W. Ry., 293 U. S. 102 (1934).

2. The assessment for the state for 1932 was $78,850,024. The 1933 assessment was $78,832,888. The latter assessment was only about five per cent. less than the 1929 valuation. The trial court found that the latter sum "was the same as the 1932 assessment except for a deduction of $17,136 for certain trackage of the plaintiff which had been removed." A state statute provided that all property within the state must be assessed at its true and full value in money. N. D. Comp. Laws (1913) § 2122, as amended by N. D. Comp. Laws 1925, c. 206, § 2.

3. This was testified to by a railroad tax expert formerly employed by the Board.

4. It is of some interest to compare the attitude expressed toward valuation as affected by the depression in the principal case with that in the most recent case on rate-fixing in the Supreme Court, West v. Chesapeake & Potomac Tel. Co., 295 U. S. 662, 672 (1935). There a public service commission attempted to fix a valuation for "fair return" on a basis adjusted according to the index prices of commodities, wages, etc. The Supreme Court rejected this method of valuation as unsatisfactory, saying, *inter alia*, "A more fundamental defect in the commission's method is that the result is affected by sudden shifts in the price level." West v. Chesapeake & Potomac Tel. Co., 295 U. S. 662, 672 (1935). See Note (1935) 49 HARV. L. REV. 297.

of other taxpayers, there was no question of discrimination, and thus no violation of the constitutional guarantee of the "equal protection of the laws".[5] Likewise, the Court found that the method used by the Board did not result in a tax upon property without the state, so that there was no attempt by the state to tax property outside its taxing jurisdiction.[6] In the absence of either of these contingencies, one would have expected the Court to restrict the scope of its review of the action of a state administrative board, in order to refrain from becoming a sort of superior Board of Equalization. And indeed, former decisions of the Court have held the function of tax-assessing bodies to be "quasi-judicial";[7] the Court has refused, in the past, to substitute its findings for those of the taxing body except when there was a clear abuse of discretion.[8] "Mere errors of judgment are not subject to review."[9] The basis for this judicial policy has been the realization that the life blood of the state government is the power to lay and collect taxes, without which the state could not continue its ordinary functions.[10] This hesitancy to interfere with administrative discretion is especially desirable in the case of a court review of so nebulous a concept as value. Assessors of value, and particularly of the value of a railroad system, are chasing a will-o'-the-wisp, for there cannot be one accurate measure of value. Market value is a useless fiction when there is no market. Value for the purpose of fixing a base for "fair return" is and should be different from value for taxation purposes, and both may be distinguished from value for the purpose of condemnation in eminest domain proceedings.[11] Any other contention assumes that value is a definite, constant, and easily observed phenomenon, and not an elaborate conjecture based on many facts, one of which facts must be the purpose for which value is being determined. It seems clear that in no case should the Court allow the due process clause to shield the taxpayer when he cannot show either that he is bearing a proportionately larger share of the tax than are other taxpayers or that the action of the taxing authorities was completely capricious. This Court merely was differing with the administrative body on the issue of the reasonableness of the valuation. Furthermore, as Justice Stone pointed out, a property tax varies with the rate fixed and the assessment made.[12] Thus, the action of the State Board of Equalization resulted merely in a general increase in the tax. And, as the Board is an agency of the legislature, the Court has, in effect, denied the power of the legislature to fix whatever tax it pleases.

5. Raymond v. Chicago Union Traction Co., 207 U. S. 20 (1907); Cumberland Coal Co. v. Board of Revision, 284 U. S. 23 (1931); Iowa-Des Moines Nat. Bank v. Bennet, 284 U. S. 239 (1931).

6. Fargo v. Hart, 193 U. S. 490 (1904); *cf.* Rowley v. Chicago & N. W. Ry., 293 U. S. 102 (1934). Such a tax is often held invalid on the ground that it is an interference with interstate commerce, which would appear to be incorrect. See *supra*, note 1.

7. See Hagar v. Reclamation District, 111 U. S. 701, 710 (1884); Londoner v. City & County of Denver, 210 U. S. 373, 386 (1908); Turner v. Wade, 254 U. S. 64, 68 (1920).

8. See Rowley v. Chicago & N. W. Ry., 293 U. S. 102, 111, 112 (1934); Chicago, G. W. Ry. v. Kendall, 266 U. S. 94, 98 (1924).

9. Sunday Lake Iron Co. v. Township of Wakefield, 247 U. S. 350, 353 (1918); Southern Ry. v. Watts, 260 U. S. 519, 527 (1923).

10. "It takes revenue to maintain the state government . . . and where it appears to this court that all the provisions of the law relative to making the levy have been substantially complied with, we will hold the levy valid." Bonaparte v. Nelson, 142 Okla. 54, 59, 285 Pac. 100, 104 (1929). See Ravage, *Valuation of Public Utilities for Ad Valorem Taxation*, (1932) 41 YALE L. J. 487, 512.

11. See Chicago & N. W. Ry. v. Eveland, 13 F. (2d) 442 (C. C. A. 8th, 1926), *cert. granted*, 273 U. S. 680 (1926), *writ dismissed* 273 U. S. 775 (1927), where the court repudiated the idea that there was identity of value for rate making and taxation purposes. See also, Bonbright, *The Problem of Judicial Valuation*, (1927) 27 COL. L. REV. 493 and Ravage, cited *supra* note 9.

12. Instant case at 436.

Constitutional Law—Minimum Price Legislation—Validity of Statute Fixing Higher Minimum Sale Price for Well-Advertised Brands of Milk than for Those Unadvertised—New York Milk Control Act provided that the minimum sale price of well-advertised brands of milk should be one cent per quart higher than that of unadvertised brands,[1] which was approximately the differential dealers in unadvertised brands had found it necessary to maintain prior to the passage of the act.[2] Plaintiff, one of four distributors whose milk had been designated by the Milk Control Board as well-advertised, sought to enjoin enforcement of the act on the ground that it violated the equal protection clause of the Fourteenth Amendment. *Held* (McReynolds, Van Devanter, Sutherland, Butler, JJ., dissenting), for defendant, because the legislature, in adapting the law to existing trade practices, had not acted unreasonably. *Borden's Farm Products Co. v. Ten Eyck,* 56 Sup. Ct. 453 (1936).

Provision making the lower price applicable only to dealers in unadvertised brands who had been in business at the time the act became effective,[3] *held* (Cardozo, Brandeis, Stone, JJ., dissenting), a denial of equal protection. *Mayflower Farms, Inc. v. Ten Eyck,* 56 Sup. Ct. 457 (1936).

Having decided in the *Nebbia* case[4] that the milk industry in New York was a proper subject for legislative price-fixing, the Court, in the *Borden* case, recognized that the equal protection clause does not require a single price standard for competing dealers, but is satisfied if the law preserves the existing price scale determined by economic forces prior to the restrictive legislation. And indeed, the differential, instead of destroying competition, the criticism advanced in the dissenting opinion,[5] actually preserved it, since at a single price the independents would have been unable to compete at all, and the purpose of the act, the promotion of the public health and prosperity through the stabilization of the milk industry, might have been defeated. Limiting the differential to existing dealers likewise could have been regarded as a reasonable means of effecting this purpose, and the Court has upheld analogous distinctions in other legislation.[6] However, the opinion endeavored to distinguish between the statute involved in the *Mayflower Farms* case and the other legislation on the ground that the latter, although imposing different restrictions on persons entering occupations at different times, was clearly related to the public health or welfare, whereas the record disclosed no basis for the distinction here, and the Court, singularly unimaginative, would not "conjure up possible situations which might justify the discrimination."[7] The dissenting justices, on the other hand, less certain of judicial infallibility, pointed out that the preferable policy, declared by the Court in earlier decisions, was not to set aside a statutory classification

1. N. Y. Laws 1934, c. 126, § 258 (q).

2. The case had come before the Court once before, on the pleadings, and had been remanded for complainant to prove that no such differential had existed prior to the statute. Borden's Farm Products Co. v. Baldwin, 293 U. S. 194 (1934). The district court then found as a fact that the advertising had created in the public mind the idea that the advertised milk was better, with the result that the independent companies could not sell their milk, although of equal grade, at the same price. Borden's Farm Products Co. v. Ten Eyck, 11 F. Supp. 599 (S. D. N. Y. 1935).

3. N. Y. Laws 1934, c. 126, § 258(q).

4. Nebbia v. New York, 291 U. S. 502 (1934), Note (1934) 82 U. of Pa. L. Rev. 619. As the sale in the Nebbia case occurred in Rochester, the problem of the differential was not involved.

5. 56 Sup. Ct. 453, 457.

6. Watson v. Maryland, 218 U. S. 173 (1910) (medical registration law applying only to those beginning practice after a certain date); Stanley v. Utilities Commission of Maine, 295 U. S. 76 (1935) (statute giving existing highway carriers licenses as of right, but requiring later entrants to prove public necessity).

7. 56 Sup. Ct. 457, 459.

as a denial of equal protection of the laws "if any state of facts reasonably may be conceived to justify it." [8]

Constitutional Law—Validity of Tennessee Valley Authority Act—The Tennessee Valley Authority, an agency of the federal government,[1] contracted with the Alabama Power Company for the sale of surplus power by the former to the latter, for the sale of transmission lines and substations by the Company to the Authority, for an interchange of hydroelectric energy, and for an allocation of the areas to be served with power by each. The transmission lines ran from the Wilson Dam, which was capable of generating enough power to enable the Authority to meet its contractual requirements. Petitioners, preferred shareholders of the Power Company, after an unsuccessful demand upon the Company's directors to cancel the contract, sought to enjoin its performance, joining the Authority and the Company as defendants. *Held* (McReynolds, J. dissenting), that the injunction should be denied. Four justices (Hughes, C. J., Van Devanter, Sutherland, and Butler, JJ.) based their opinion on the ground that the action of the Authority was constitutional; four justices (Brandeis, Stone, Roberts, and Cardozo, JJ.) concurred on the ground that the petitioners had no standing before the Court. *Ashwander v. Tennessee Valley Authority*, 56 Sup. Ct. 466 (1936).

The constitutionality of sales by the federal government of electric power incidentally generated by projects maintained primarily for war purposes [2] or for the improvement of navigable waters [3] is well supported.[4] Chief Justice Hughes, avoiding the issue of the validity of the entire Tennessee Valley program by confining his opinion solely to the question of the Wilson Dam, which had been originally constructed as a military measure,[5] decided that the construction of the dam was a reasonable exercise of the war powers of Congress and a legitimate aid to navigability. Then, discarding the contention that the only power saleable was the negligible surplus which would have to be produced as a margin of safety to insure an adequate supply of electricity for the manufacture of munitions and the operation of the locks, four justices held that all the energy produced by the fall of water was incidentally acquired national property capable, under the Constitution, of conversion into electric power and subsequent alienation. In view of the unlimited terms of the expressly conferred Congressional disposal power [6] an insistence upon the surplus requirement would have been unwarranted. Indeed, the power is so broadly stated

8. 56 Sup. Ct. 457, 461, quoting from Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580, 584 (1935).

1. Established by 48 STAT. 58 (1933), 16 U. S. C. A. § 831 (Supp. 1935).

2. U. S. CONST. Art. I, § 8, cl. 11-16.

3. The power of Congress over navigation has been deduced from the commerce clause, U. S. CONST. Art. I, § 8, cl. 3, the leading case being, of course, Gibbons v. Ogden, 9 Wheat. 1 (U. S. 1824). See Gilman v. Philadelphia, 3 Wall. 713 (U. S. 1866). See also, 2 WILLOUGHBY, CONSTITUTION OF THE UNITED STATES (2d ed. 1929) 571.

4. See United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 73 (1913); *cf.* Green Bay & Miss. Canal Co. v. Patten Paper Co., 172 U. S. 58 (1898); Alabama Power Co. v. Gulf Power Co., 283 Fed. 606 (M. D. Ala. 1922); Waters v. Phillips, 284 Fed. 237 (C. C. A. 7th, 1922); Alabama v. United States, 38 F. (2d) 897 (Ct. Cl. 1930); Missouri v. Union Electric Light & Power Co., 42 F. (2d) 692 (C. C. Mo. 1930), *appeals dismissed*, 53 F. (2d) 1080, 1084 (C. C. A. 8th, 1931). See, for a more complete discussion, Welch, *Constitutionality of the Tennessee Valley Authority* (1935) 23 GEO. L. J. 388; Clothier, *The Federal Water Power Program* (1935) 84 U. OF PA. L. REV. 1; Notes (1935) 48 HARV. L. REV. 806; 83 U. OF PA. L. REV. 662; (1936) 9 S. CAL. L. REV. 137.

5. See instant case at 473.

6. U. S. CONST. Art. IV, § 3, cl. 2.

that the validity of restricting its application only to such property as is incidentally acquired through the exercise of other powers might be questionable. The Court has not gone this far, however, but has implied, rather, that although Congress may deal freely with federal property, the government may not acquire property for the very purpose of sale nor engage in a general manufacturing and merchandising business disassociated from the exercise of other governmental powers.[7] While applying this limitation, the decision still permitted a relatively insignificant connection with navigation and munitions manufacture to support an extensive selling activity. But in this respect it did not go far beyond *Arizona v. California*,[8] which approved the constitutionality of the Boulder Dam development. The dissenting justice realistically pointed out that the Authority was designed to be and actually was primarily an agency for the rehabilitation of a large area and a "yardstick" for private electric rates, a position for which he found ample support in the Authority's own reports.[9] Nevertheless, the inclination of the Chief Justice to narrow the Court's review appears to be more desirable in a situation where the government is dealing with its own property and is not regulating directly the use of private property.

But if the scope of judicial review was restricted, its availability was extended, for, with no showing of bad faith on the part of the directors or even of injury to the shareholders, the latter were permitted to maintain a suit solely because the other contracting party was alleged to have acted unconstitutionally. The cases cited by the Court as upholding the power of shareholders to enjoin the corporate management from complying with the exactions of legislation claimed to have been invalid,[10] were hardly apposite, since they involved coercion upon the corporation, and the directors did not act voluntarily and for a wholly satisfactory consideration. In *Smith v. Kansas City*,[11] most heavily stressed, the Court had assumed jurisdiction over a shareholder's bill to enjoin directors from investing in the bonds of an allegedly unconstitutional federal agency. But in that case, unsatisfactory at best, it was assumed that the corporation could make "legal investments" only, so that the constitutional question was only incidental to the problem of ultra vires acts by the corporation.[12] The instant Court may have been motivated by a desire to afford a review for

7. Such an interpretation is, of course, broader than the usual verbalism limiting the exercise of disposal power only to property acquired incidentally in the exercise of other granted powers, since conceivably property might be acquired outside those powers and yet not for the purpose of resale. That this is the more accurate way of putting the proposition may appear from the following hypothetical situation. Suppose the federal government acquired land for a purpose later discovered not to be within its delegated powers, as say, for growing wheat. Can it be supposed that the land could not rightfully be sold or leased? An affirmative answer is as unwarranted as a statement that money obtained by an unconstitutional tax, paid without protest, cannot be expended. The sale of the wheat to be grown on the land might be forbidden, however, just as the sale of power released by the fall of water over a dam. So too, no one could reasonably contend that if the sale of power by TVA had been held unconstitutional, the government would have been unable to sell Wilson dam.

8. 283 U. S. 423 (1931), which affirmed the validity of water-power projects provided they were "not unrelated to the control of navigation". *Id.* at 455, 456. The case found that the dam and hydroelectric plant erected in Boulder Canyon were valid means of controlling navigation, although the practical effects on navigation were slight, while there was an extensive development and sale of electric power. See Note (1935) 48 HARV. L. REV. 806, 812.

9. Cited in the instant case at 489n.

10. As in Brushaber v. Union Pac. R. R., 240 U. S. 1 (1916), where the right of shareholders to seek to restrain voluntary payment of an allegedly invalid tax was sustained. The authorities in which the constitutionality of a statute was tested by shareholders' suits are fully reviewed in Mr. Justice Brandeis' concurring opinion. Instant case at 484-486.

11. 255 U. S. 180 (1921).

12. See *id.* at 199, and Mr. Justice Holmes dissenting at 214.

legislation not readily reviewed otherwise,[13] or by the feeling that the threatened competition by the Authority was an economic coercion effective enough to approximate "duress" upon the corporate directors, and thus warranted hearing the complaint of the shareholders.

Equity—Personal Rights—Taxpayer's Power to Enjoin Governmental Investigation of Books in His Broker's Possession Relative to Past Income Taxes Collection of Which Had Been Barred by the Statute of Limitations—Complainant filed income tax returns for 1929 and 1930, which were approved, with corrections, by the Department of Internal Revenue within the period prescribed by statute.[1] Three years after the expiration of such period the Department sought to investigate the records of complainant's broker and banker regarding complainant's transactions during 1929 and 1930, which investigation complainant sought to enjoin.[2] *Held,* that an injunction should issue in order to protect complainant's right to be secure in his private affairs. *Zimmerman v. Wilson,* C. C. A. 3rd, Feb. 11, 1936.

The first portion of the court's opinion is apparently based on the constitutional right of one to be secure in one's ". . . papers, and effects, against unreasonable searches . . .".[3] However, it is generally recognized that the fourth amendment to the Constitution applies only to criminal prosecutions,[4] with which complainant in the instant case was not threatened.[5] While, therefore, continued governmental investigation might become irksome, it would not be unconstitutional.[6] It is apparent, therefore, that the basis for the decision is to be found not in the Fourth Amendment, but in the acceptance of the principles that a person has a property right in the information contained in his broker's books, so far as it relates to the taxpayer's transactions, and that the courts should prevent a "violation of the natural law of privacy in one's own affairs which exists in liberty loving peoples and nations."[7] But, while there is authority

13. A similar attitude has recently been shown towards the spending power. See United States v. Butler, 56 Sup. Ct. 312 (1936), 84 U. OF PA. L. REV. 547, restricting the doctrine of Massachusetts v. Mellon, 262 U. S. 447 (1923).

1. 45 STAT. 856, 857 (1928), 26 U. S. C. A. §§ 275, 276 (1934).

2. While there was a conflict in the record as to whether the broker's books had been inspected by the Department of Internal Revenue during its first audit of complainant's return for 1929 and 1930, the court, in its opinion, assumes that there had been such an examination.

3. U. S. CONST. Amend. 4. In the words of the court, at p. 4, ". . . a search for which no reason can be shown is an unreasonable search", the theory being that since no further assessment could be levied, there was no reason or purpose in such a re-examination.

4. In re Strouse, Fed. Cas. No. 13,548 (D. Nev. 1871); U. S. v. Distillery No. Twenty-eight, Fed. Cas. No. 14,966 (D. Ind. 1875); United States v. First Nat. Bank of Mobile, 295 Fed. 142 (D. Ala. 1924), *aff'd,* 267 U. S. 576 (1925).

5. So far as appears from the government brief in the case, as well as from the opinion of the court, there was no allegation of a fraudulent return having been made by complainant which would subject him to criminal prosecution.

6. Bolich v. Rubel, 67 F. (2d) 894 (C. C. A. 2d, 1933).

7. Typewritten opinion, at 6. It is the attempt to enjoin the search of books in the hands of a third party, under the conditions described, which makes this case one of first impression. There have been apparently, only two cases in which injunctions have been sought to prevent the government from obtaining information in the hands of a third party, and in both the injunctions were denied. Cooley v. Bergin, 27 F. (2d) 930 (D. Mass. 1928) (the statute of limitations had not yet barred any further tax assessments); Caplis v. Helvering, 4 F. Supp. 181 (E. D. N. Y. 1933) (the third party sought the injunction, which was denied on the ground that there was an adequate remedy at law).

which recognizes the fiduciary nature of a broker's employment,[8] as well as the obligation of a bank to make no improper disclosure of the depositor's affairs to unauthorized persons,[9] still that would hardly justify the request for an injunction, based on a *property right* in the *information* contained in the broker's books, and this property right generally has not been extended as far as it was in the present case.[10] It would seem, therefore, that the decision can be supported only upon the individual's "right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of (his) personal and private affairs." [11] While there has been, in recent years, a desirable and ever growing tendency to protect by injunction the right to privacy, this protection has largely been accorded in cases of violations of this right by individuals; and there has been, during the same period, an equal extension of governmental activity, so that it is more doubtful whether the same protection should be afforded against an alleged governmental invasion of the interest in privacy.

Evidence—Admissibility of Record of Criminal Conviction in Civil Action as an Exception to the Hearsay Rule—Plaintiff, the administrator of an intestate insured against accidental death by defendant insurance company, sought recovery of the insurance proceeds in substitution for the named beneficiary, who was alleged to have become disentitled because she had feloniously taken the life of the insured.[1] To prove the fact of the felonious killing, and that in consequence the insured's estate became entitled to the proceeds, plaintiff offered in evidence the criminal conviction of the beneficiary for manslaughter. *Held,* the evidence was inadmissible, because a criminal conviction could not be given in evidence in a civil action to prove the facts upon which it had been rendered. *Goodwin v. Continental Casualty Co.,* 53 P. (2d) 241 (Okla. 1935).

This decision represents the weight of authority that the record of a criminal conviction is inadmissible in a subsequent civil action as proof of facts in issue in both trials, on the ground that it is merely hearsay evidence of the facts found.[2] However, the more modern tendency is to favor the admission of a conviction as prima facie evidence of the facts on which it is based, despite its character as hearsay, as there is a sufficient guarantee of truth.[3] Perhaps the

8. American Cotton Mills v. Monier, 61 F. (2d) 852 (C. C. A. 4th, 1932); Lipkien v. Krinski, 192 App. Div. 257, 182 N. Y. Supp. 454 (1st Dep't. 1920); Vollmer v. Newburger, 277 Pa. 282, 121 Atl. 56 (1923).

9. Tournier v. National Provincial and Union Bank of England [1924] 1 K. B. 461; PAGET, BANKING (3d ed. 1922) 77.

10. This type of property right has generally been extended only to cover information contained in private letters. See Warren and Brandeis, *The Right to Privacy* (1890) 4 HARV. L. REV. 193, 211. And so far as appears, in only one case at all comparable to the principal one, Brex v. Smith, 104 N. J. Eq. 386, 146 Atl. 34 (Ch. 1929) has the court enjoined a public official from investigating bank records on the ground of complainant's property interest in the information contained therein. *Contra:* Cooley v. Bergin, 27 F. (2d) 930 (D. Mass. 1928).

11. Sinclair v. United States, 279 U. S. 263, 292 (1929). See also *In re* Pacific Ry. Commission, 32 Fed. 241, 250 (1887).

1. Death of insured as a result of the felonious act of the beneficiary defeats the beneficiary's right to the proceeds of the policy. New York Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591 (1886); VANCE, LAW OF INSURANCE (2d ed. 1930) § 156.

2. United States v. Guay, 11 F. Supp. 806 (D. N. H. 1935); Page v. Phelps, 108 Conn. 572, 143 Atl. 890 (1928); Girard v. Vermont Fire Ins. Co., 103 Vt. 330, 154 Atl. 666 (1931); 2 FREEMAN, JUDGMENTS (5th ed. 1925) § 653.

3. Sovereign Camp, W. O. W. v. Gunn, 227 Ala. 400, 150 So. 491 (1933); Douglas v. Central of Georgia Ry. Co., 48 Ga. App. 427, 172 S. E. 828 (1934); Tucker v. Tucker, 101 N. J. Eq. 72, 137 Atl. 404 (1927), Schindler v. Royal Ins. Co., 258 N. Y. 310, 179 N. E. 711 (1932); In the Estate of Crippen [1911] Prob. 108. A few cases have held the conviction

most fundamental guarantee of the truth of evidence is the right of cross-examination by the party against whom it is offered.[4] When the party in the civil action against whom a conviction is introduced was also the accused in the criminal action, it is manifest that an adequate opportunity and incentive to cross-examine witnesses were had, and that the truth to be ascertained thereby was sufficiently guaranteed. But where, as in the instant case, the party in the civil action was not the accused, the introduction of the conviction would be in deprivation of his right to cross-examine, and therefore it would seem that the evidence ought to be inadmissible.[5] However, this usually valid objection to hearsay evidence is outweighed by the great probative value of the criminal conviction, arising out of the necessity for proof of guilt beyond a reasonable doubt.[6] Furthermore, there are other reasons for admissibility, peculiar to, but especially pertinent in the instant case. In the first place, the defendant insurance company could have introduced the conviction, under the modern rule of admissibility, against the convicted beneficiary if the latter had sued for the proceeds. In addition, the defendant impliedly admits its liability to pay the proceeds to someone, but pleads its liability to the criminal beneficiary rather than to the present plaintiff. Thus, since the defendant bases its defense upon the rights of the beneficiary, the same evidence should be admissible against the defendant as would have been admissible against that beneficiary.

Master and Servant—Liability of Master for Negligence of Servant When Latter Has Injured His Own Wife—Plaintiff, while riding in an automobile belonging to her husband's employer, which her husband was driving on business within the scope of his employment, was injured in a collision caused by her husband's negligence. Suit was brought against the employer, who joined the husband as defendant by a writ of *scire facias*. Separate judgments were given for plaintiff against the employer, and for the employer against plaintiff's husband. On appeal from the first judgment, *held,* for plaintiff, on the ground that the master is liable for the wrongful acts of his servant, notwithstanding the latter's personal immunity from suit by the plaintiff,[1] which is defeated by

to be conclusive evidence of the facts involved. Supulver v. Gilchrist & Dawson, 28 N. M. 339, 211 Pac. 595 (1922); Eagle, Star & British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S. E. 314 (1927). The possibility of an absurd result where the prior conviction is totally excluded is shown in Lillie v. Modern Woodmen of America, 89 Neb. 1, 130 N. W. 1004 (1911), where a beneficiary of a life policy was allowed to recover the insurance proceeds after having been convicted of the insured's murder, although a clause of the policy provided that the policy would be void if the death of the insured were caused by the beneficiary.

4. See Maybee v. Avery, 18 Johns. 351, 354 (N. Y. 1818). Evidence of a conviction should not be excluded merely because of the lack of "mutuality" due to the inadmissibility of an acquittal. See 2 FREEMAN, JUDGMENTS (5th ed. 1925) § 656; Note (1932) 17 CORN. L. Q. 493; (1932) 80 U. OF PA. L. REV. 1164. Nor should it be held inadmissible because of the fact that the degree of proof in the subsequent civil action differs from that necessary in the prior criminal action, for a *lesser* degree is required in the civil action. See Schindler v. Royal Ins. Co., 258 N. Y. 310, 313, 179 N. E. 711, 712 (1932). For a full discussion of the reasons against admissibility of criminal conviction in a civil action, see Interstate Dry Goods Store v. Williamson, 91 W. Va. 156, 112 S. E. 301 (1922); Note (1924) 31 A. L. R. 261, 264.

5. Summers v. Rutherford, 195 S. W. 511 (Mo. App. 1917); 3 WIGMORE, EVIDENCE (2d ed. 1923) § 1388.

6. See Chafee, *The Progress of the Law—Evidence* (1922) 35 HARV. L. REV. 428, 440, for a suggestion that an exception to the hearsay rule for "solemn adjudications" in general would be desirable.

1. A Pennsylvania statute provides that a wife may not sue her husband except in a proceeding for divorce or to protect and recover her separate property. PA. STAT. ANN. (Purdon, 1930) tit. 48, § 111.

the servant's subsequent liability to the master.[2] *Koontz v. Messer,* 181 Atl. 792 (Pa. 1935).

In holding the employer liable, the Pennsylvania Supreme Court followed the trend of authority,[3] which rests upon the theory that the basis of vicarious liability is not the servant's liability, but his wrongdoing. As was indicated in a previous issue of the REVIEW,[4] since vicarious liability is justified on the ground that it permits including in the cost of the enterprise the risks normally incident thereto, the fact that the person injured happens to be a member of the wrongdoer's family should be immaterial.

Mortgages—Power to Proceed Against Personalty Prior to Realty Under the Pennsylvania Deficiency Judgment Act of 1935—Plaintiff mortgagee entered judgment on the bond of defendant mortgagor. The latter petitioned to quash an attachment on personal property, contending that the mortgaged premises must first be sold in order to fix the amount of the deficiency judgment. *Held,* that the Pennsylvania Deficiency Judgment Act of 1935[1] did not require the mortgagee to proceed first against the realty, but permitted him to enter judgment on the bond and attach personalty of the mortgagor at once. *Integrity Trust Co. v. Wilkinson,* 24 D. & C. 549 (Pa. 1935).

Several distressed mortgagors have recently, before the trial courts of Pennsylvania, advanced the contention so effectively discarded in the instant case.[2] No express support for the position that the creditor's common law rights against collateral have been restricted is to be found in the statute as a whole. Taken separately, however, the last clause of Section 1,[3] when compared with the title of the Act[4] does furnish some basis for the contention of the debtor-mortgagor. It seems clear, however, that the legislature did not intend that creditors should be forced to resort to a useless sale as a formal

2. The court had previously held that the statute permitting a defendant to join as an additional defendant by writ of *scire facias* anyone alleged to be liable over to him for the cause of action declared on [PA. STAT. ANN. (Purdon, 1930) tit. 12, § 141] was not intended to alter the plaintiff's rights as to the original defendant. Vinnacombe v. Philadelphia, 297 Pa. 564, 147 Atl. 826 (1929).

3. Chase v. New Haven Waste Material Corp., 111 Conn. 377, 150 Atl. 107 (1930); Schubert v. August Schubert Wagon Co., 249 N. Y. 253, 164 N. E. 42 (1928); Poulin v. Graham, 102 Vt. 307, 147 Atl. 698 (1929); RESTATEMENT, AGENCY (1933) § 217 (2). *Contra:* Maine v. Maine & Sons Co., 198 Iowa 1278, 201 N. W. 20 (1924); Sacknoff v. Sacknoff, 131 Me. 280, 161 Atl. 669 (1932); *cf.* Riser v. Riser, 240 Mich. 402, 215 N. W. 290 (1927).

4. (1936) 84 U. OF PA. L. REV. 429.

1. PA. STAT. ANN. (Purdon Supp. 1935) tit. 21, § 808.

2. Shallcross v. North Branch-Sedgwick B. & L. Ass'n, 24 D. & C. 496 (Pa. 1935); Commercial Bldg. Ass'n v. Steen, 24 D. & C. 575 (Pa. 1935). See Ridge-Allen B. & L. Ass'n v. Leshefko, 24 D. & C. 703 (Pa. 1935). For a holding that the mortgagee was not precluded from realizing on additional collateral pledged for the obligation before foreclosing on the mortgage and establishing a deficiency judgment, see Evans v. Provident Trust Co., 319 Pa. 50, 179 Atl. 452 (1935), which interpreted a prior act, PA. STAT. ANN. (Purdon Supp. 1935) tit. 21, § 806.

3. PA. STAT. ANN. (Purdon Supp. 1935) tit. 21, § 808. "In all cases where a bond and mortgage, or any other obligation securing or guaranteeing the payment thereof, is or has been given for the same debt, the real property, bound by such bond and mortgage, shall first be proceeded against and sold on execution, and the amount of the deficiency judgment ascertained, as hereinafter provided, before any other *real* property of the mortgage debtor may be attached, levied on or sold for the debt secured by such bond and mortgage, and *before any property, real or personal of any such other person* may be sold for the debt secured by such bond and mortgage (italics added).

4. Pa. Laws (1935) 503. "To protect the obligors or guarantors of bonds and mortgages, and owners of property affected thereby, and *others* indirectly liable for the payment thereof, and owners of mortgaged property affected thereby" (italics added).

prerequisite to proceedings against a thoroughly solvent debtor.[5] The variety of possible interpretations open to the court should not distract attention from the clearly correct result, whether it be based upon the rule of statutory construction that statutes in derogation of the common law should be strictly construed, which would leave the mortgagee's usual rights against collateral unimpaired, or upon a praiseworthy attempt to penetrate beyond meaningless language and ascertain the real "intent" of the legislature.

Taxation—Governmental Immunity—Power of a State to Tax Shares of National Bank Held by Reconstruction Finance Corporation—Reconstruction Finance Corporation owned all the preferred stock of defendant national bank, which contended the shares were immune from state and municipal taxation.[1] The statute creating the Reconstruction Finance Corporation exempted from taxation its franchise, its capital, its reserves and surplus.[2] An earlier statute had withdrawn from national bank shares the immunity from taxation usually granted to governmental instrumentalities.[3] *Held,* that the shares were taxable because the statute according the Reconstruction Finance Corporation immunity from taxation was not intended to withdraw the consent which Congress had previously given to the taxation of *all* national bank shares.[4] *Baltimore Nat. Bank v. State Tax Comm. of Maryland,* 56 Sup. Ct. 417 (1936).

In view of the all-inclusive language of the statute by which Congress gave consent to the taxation of national bank shares,[5] the result reached in the instant case would appear to be correct. The Court had already held that national bank shares owned by other national banks were taxable,[6] and it would seem that the immunity to which national banks are entitled by virtue of being governmental instrumentalities[7] is no less than that which the Reconstruction Finance Corporation could claim as a governmental instrumentality. Moreover, a well settled rule of statutory construction—that an act whose terms are specific is to be construed as an exception to one more general in terms—[8] supports the Court's view that the act creating the Reconstruction Finance Corporation and

5. "It cannot be contended that, where the obligor on a bond is in possession of cash funds, he is excused of his obligation of contract, and that an obligee must first apply himself to what may be a fruitless sale of real estate, with its incident legal expenses, before being able to attach funds belonging to the obligor." Shallcross v. North Branch-Sedgwick B. & L. Ass'n, 24 D. & C. 496, 498 (Pa. 1935).

1. It is settled practice for a bank or other corporation to litigate a question of taxability on behalf of its stockholders. Des Moines Nat. Bank v. Fairwether, 263 U. S. 103 (1923).

2. 47 STAT. 5, 9 (1932), 15 U. S. C. A. §§ 601, 610 (Supp. 1934).

3. 44 STAT. 223 (1926), 12 U. S. C. A. § 548 (1926). The statute traces its origin to 13 STAT. 99, 112 (1864).

4. With respect to the question whether Congress intended in exempting the Reconstruction Finance Corporation from taxation that national bank shares held by the Corporation should nevertheless be taxable, it is interesting to note that an administration-sponsored bill extending the immunity to cover the present case passed the Senate (80 CONG. REC. Feb. 24, 1936 at 2698), but was defeated in the House (80 CONG. REC. Feb. 25, 1936 at 2864).

5. 44 STAT. 223 (1926), 12 U. S. C. A. § 548 (1926) provides: "The legislature of each State may determine . . . the manner and place of taxing all the shares of national banking associations located within its limits."

6. Bank of Redemption v. Boston, 125 U. S. 60 (1883). The Court says, at p. 70, that the question of ownership is not material in deciding whether the shares are taxable.

7. McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819). See (1935) 84 U. OF PA. L. REV. 263; (1936) 84 U. OF PA. L. REV. 664.

8. Kepner v. United States, 195 U. S. 100, 125 (1904); Townsend v. Little, 109 U. S. 504, 512 (1883).

granting it immunity from taxation was not intended to preclude the operation of the earlier act withdrawing the immunity from national bank shares. The Court of Appeal of Maryland, from which the instant case was appealed, had reached the same result by quite different reasoning in an opinion [9] discussed in an earlier issue of the REVIEW.[10] The Maryland court held the shares taxable because the Reconstruction Finance Corporation, not performing essential governmental functions, was not entitled to immunity as a governmental instrumentality.

Taxation—Inheritance Taxes—Power of a State to Tax Intangible Property Owned by One Domiciled in a Foreign Country—A domiciliary of Canada died leaving substantial accounts in banks in the state of Washington. Washington sought to collect an inheritance tax on these accounts under a statute [1] which imposed the tax on all property within the state's jurisdiction. *Held,* that the bank accounts were subject to the inheritance tax. In re *Lloyd's Estate,* 52 P. (2d) 1269 (Wash. 1936).

A series of cases [2] in the last six years has made it clear that two states cannot levy inheritance taxes on the transfer of the same property without violating due process of law.[3] Tangible property is subject to taxation only by the state in which it is physically located,[4] whereas intangible property is taxable only in the state in which its owner is domiciled.[5] These decisions, which reversed prior authority,[6] were obviously necessary in order to prevent the increasing injustice occasioned by the previous multiple taxation. As bank accounts are intangibles,[7] the accounts in the instant case would have been subject to taxation by the domicile of the deceased. This case, therefore, raises the question whether the due process clause prohibits a state from taxing property which is also taxable in a foreign country, instead of in a sister state.[8] The Supreme Court has held that the Fourteenth Amendment requires the states to respect each other's rights in regard to inheritance taxes, and so guarantees mutuality. However, an application of the rules governing taxation by two states to international cases would put American courts in the position of protecting foreigners against such multiple taxation while our own citizens with foreign interests remained subject to double taxation. And, recognizing the possibility of the danger in an analogous case, the United States Supreme Court recently held valid under the due process clause of the Fifth Amendment a federal tax on intangibles located within this country, but owned by an English domiciliary who had died in Cuba.[9] Therefore, the present decision appears to

9. Baltimore Nat. Bank v. State Tax Comm. of Maryland, 180 Atl. 260 (Md. 1935).
10. (1935) 84 U. OF PA. L. REV. 263.

1. WASH. REV. STAT. (Rem. 1933) § 11201.
2. Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930); Baldwin v. Missouri, 281 U. S. 586 (1930); Beidler v. South Carolina Tax Commission, 282 U. S. 1 (1930); First National Bank of Boston v. Maine, 284 U. S. 312 (1932).
3. See Merrill, *Jurisdiction to Tax—Another Word* (1935) 44 YALE L. J. 582; Note (1933) 47 HARV. L. REV. 307, 309.
4. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 (1905); Frick v. Pennsylvania, 268 U. S. 473 (1925).
5. Note 2 *supra.*
6. See, *e. g.,* Blackstone v. Miller, 188 U. S. 189 (1903).
7. Baldwin v. Missouri, 281 U. S. 586 (1930).
8. One case on this point has previously arisen. The decision was the same as that in this case. *In re* McCreery's Estate, 220 Cal. 26, 29 P. (2d) 186 (1934), Note 23 CAL. L. REV. 93.
9. Burnett v. Brooks, 288 U. S. 378 (1933), 42 YALE L. J. 1277, Note 47 HARV. L. REV. 307. See also, *Developments in the Law of Taxation* (1934) 47 HARV. L. REV. 1209, 1222.

be correct, for logically, there does not appear to be any difference between the power of the states and of the federal government to tax intangibles owned by foreign domiciliaries. Although multiple taxation in this, as in other situations, is undesirable, the best way to avoid the duplication of taxes is by reciprocal agreements with foreign nations.[10] The protection of foreigners from multiple taxation under the present circumstances would destroy our bargaining power for the negotiation of such agreements, with consequent unfairness to citizens of the United States who own intangible property situated abroad.

Torts—Liability of Land Occupier for Acts Done off the Land Which Result in Injury to Trespasser on the Land—Defendant, while laying a drain pipe, but not on its land, negligently damaged a gas main encased therein. A year later, the gas escaping from the main flowed through the drain pipe into a vacant house owned by the same defendant, and asphyxiated plaintiff's intestate, a trespasser there. *Held* (one judge dissenting), that defendant was liable since its immunity as a land occupier did not extend to acts or omissions done off the land, even though they took effect on the land. *Ehret v. Village of Scarsdale*, 269 N. Y. 198, 199 N. E. 56 (1935).

It is a familiar principle that land occupiers are under no duty either to make the land reasonably safe for trespassers[1] or to refrain from activities unreasonably dangerous to them.[2] The instant case introduces a limitation on this immunity which seems never to have been applied before, but which is consistent with the reasons underlying the immunity, as is apparent from an examination of its real basis. It has been said that the land occupier owes the trespasser no duty of exercising reasonable care because the latter is a wrongdoer.[3] If that were the correct basis of the land occupier's immunity, the defendant should have prevailed in the instant case, for plaintiff's intestate was no less a wrongdoer because defendant had done the act off the land.[4] But this is not the basis, for although the trespasser is equally a wrongdoer when he is injured by the land occupier's intentionally wrongful act,[5] or when he is injured because of a dangerous condition created by a trespasser, or a licensee of the land occupier,[6] or when he is injured by a negligent act done off the land by one other than the land occupier,[7] he is, nevertheless, allowed recovery. It has been said, also, that a trespasser's presence is unforeseeable, and for that reason there is no duty to refrain from acts which are in fact dangerous to him.[8] But, it is common experience that people trespass frequently,[9] and, moreover, in the instant

10. See Carroll, *The Development of International Tax Law* (1935) 29 AM. J. INT. L. 586; SELIGMAN, DOUBLE TAXATION AND INTERNATIONAL FISCAL CO-OPERATION (1928) 170.

1. Union Stock Yards & Transit Co. v. Rourke, 10 Ill. App. 474 (1881); HARPER, TORTS (1933) § 90; RESTATEMENT, TORTS (1934) § 333 (a).

2. Capitula v. New York C. R. R., 213 App. Div. 526, 210 N. Y. Supp. 651 (3d Dep't, 1925); HARPER, TORTS (1933) § 90; RESTATEMENT, TORTS (1934) § 333 (b). But *aliter* where the presence of the trespasser is known. Herrick v. Wixom, 121 Mich. 384, 80 N. W. 117 (1899); RESTATEMENT, TORTS (1934) § 336.

3. See Lary v. Cleveland, C. C. & I. R. R., 78 Ind. 323, 326 (1881); Sweeney v. Old Colony & Newport R. R., 92 Mass. 368, 372 (1865).

4. See Alabama Fuel & Iron Co. v. Bush, 204 Ala. 658, 660, 86 So. 541, 544 (1920).

5. Bird v. Holbrook, 6 L. J. (o. s.) C. P. 146 (1828).

6. Humphrey v. Twin State Gas and Electric Co., 100 Vt. 414, 139 Atl. 440 (1927); see Note (1929) 77 U. OF PA. L. REV. 506, 508.

7. Wilson v. American Bridge Co., 74 App. Div. 596, 77 N. Y. Supp. 820 (1902).

8. Murphy v. C. R. I. & P. R. R., 38 Iowa 539, 543 (1874).

9. See Goodrich, *Landowner's Duty to Strangers on His Premises—As Developed in the Iowa Decisions* (1922) 7 IOWA L. BULL. 65, 71, which rejects as an explanation of the landowner's immunity the theory that a trespasser's presence is not to be foreseen.

case there can be little doubt that plaintiff's intestate was within the class of persons who should have been foreseen to have been endangered by the negligent laying of the pipe.[10] Finally, and most accurately, the land occupier's immunity has been explained by the reluctance of the courts to interfere with his freedom to apply his land to any use he may desire. Therefore, a duty to exercise reasonable care toward others on his land is imposed only when he has voluntarily assumed such a duty, or has received some benefit from their presence.[11] But this social and historical reason, which would seem to be the true basis of the land occupier's privilege to act in a way which would be negligent if he did not enjoy his peculiar status, can have no application where, as here, the act for which liability is sought to be imposed was neither committed on the land nor related closely to the enjoyment of it. Freedom to engage in activities on one's land obviously is not abridged by a refusal to grant one an immunity with respect to acts done off the land and unconnected with its possession. Although the majority opinion and the dissent both recognize this fact, the majority would impose liability in all cases in which the act is done off the land, whereas the dissenting judge would deny the privilege only when the act was done off the land and, in addition, was not closely related to the possession of the land. While the latter view would seem correct in theory, the practical difficulty of applying it, together with the desirable tendency of the law toward limiting the land occupier's immunity, render the principle applied by the majority preferable.

Trusts—Successive Beneficiaries—Status of Corporate Stock Acquired with Corpus Funds by Exercise of Rights to Subscribe Granted During Life Estate—Corporate shares and cash were left in trust for *A* for life, remainder to *B*. During *A's* life, the corporation granted pre-emptive rights which the trustee exercised by purchasing, with funds of the *corpus*, new shares at less than their book value, retaining them as part of the *corpus*. The book value of the original shares had increased sufficiently to offset the amount withdrawn by the trustee.[1] *Held*, that the new shares should be distributed to *A* without reimbursing the *corpus* for the purchase price, as the intact value of the *corpus* was preserved.[2] In re *Hostetter's Estate*, 319 Pa. 572, 181 Atl. 567 (1935).

10. Principal case at 60, 61. There is a dictum in Alabama Fuel & Iron Co. v. Bush, 204 Ala. 658, 660, 86 So. 541, 544 (1920) that a land occupier's duty to a trespasser cannot be increased by the fact that the land occupier does the act off his land. In that case, defendant, on a highway, negligently permitted his horse to run away and injure plaintiff, who was trespassing on defendant's land. Denial of liability there could have been based on the ground that plaintiff's danger could not have been foreseen, even if the plaintiff were lawfully on the land. On very similar facts, it was held in Tolhausen v. Davies, 59 L. T. 436 (Q. B. 1888) that plaintiff was outside the scope of defendant's duty, whether the former was rightfully or wrongfully on defendant's land.

11. See Bohlen, *The Basis of Affirmative Obligations in the Law of Torts*, (1905) 53 AM. L. REG. 209, 239.

1. The court presumed throughout that all increase of value in the shares was due to earnings in the period after the creation of the trust.

2. The intact value was as follows:

Original 1300 shares @ $78.60 (original value)	$102,180
Purchased 345 shares @ $50.00	17,250
Intact Value	$119,430
Distribution:	
To *B*: 1304 shares @ $91.65 (present value)	$119,511
To *A*: 341 shares @ $91.65	31,253
	$150,764

Contrary to the great weight of authority,[3] Pennsylvania courts have held that the proceeds of the sale of stock rights granted during the life tenancy should be apportioned, the remainderman receiving enough to preserve the intact value of the *corpus,* the balance being distributed to the life tenant.[4] However, the instant case is apparently the first to involve directly the exercise of stock rights with funds of the *corpus,*[5] and by its decision the court has taken another step toward limiting the remainderman's share to the bare intact value of the *corpus.* Two methods of distribution were possible in the present case under the principle previously enunciated by the court in *Nirdlinger's Estate:*[6] (1) award the remainderman as many shares at their present book value as equal the intact value of the *corpus*—determined by adding the amount of cash withdrawn to the original book value of the original shares—with the balance going to the life tenant. This method was approved in a recent *dictum*[7] and adopted in the instant case; (2) award the remainderman the original shares plus enough additional shares at their present book value to reimburse the *corpus* for the cash withdrawn, the balance then being apportioned between the life tenant and the remainderman in order to maintain the intact value of the *corpus.*[8] This method seems preferable, for, as the funds withdrawn from the *corpus* and applied to the purchase of additional shares represent a new investment in capital,[9] the *corpus* should be reimbursed before any distribution occurs. The increased value of the trust property came from two different sources, the profit resulting from the exercise of the rights and the increased book value of the original shares. The former is income which has been distributed to stockholders, and, therefore, belongs to the life tenant. But the latter represents accumulated surplus which has not been realized, either through declaration of a dividend or sale by the trustee, and therefore belongs to the remainderman.[10]

3. Most states treat the proceeds of the sale of stock rights as belonging to the remainderman. Powell v. Madison Safe Deposit & Trust Co., 196 N. E. 324 (Ind. 1935); 2 PERRY, TRUSTS (7th ed. 1929) § 546; RESTATEMENT, TRUSTS (1935) § 236 (c); UNIFORM PRINCIPAL AND INCOME ACT § 5 (2). There are, however, two decisions in other states which held that the profit derived from the sale of stock rights should be distributed to the life tenant, so long as the intact value is maintained. *In re* Schnur's Estate, 32 P. (2d) 970 (Cal. 1934), (1934) 83 U. OF PA. L. REV. 98; Holbrook v. Holbrook, 74 N. H. 201, 66 Atl. 124 (1907).

4. Nirdlinger's Estate, 290 Pa. 457, 139 Atl. 200 (1927); Waterhouse's Estate, 308 Pa. 422, 162 Atl. 295 (1932); see Jones v. Integrity Trust Co., 292 Pa. 149, 153, 140 Atl. 862, 863 (1928). The earlier Pennsylvania rule had been *contra.* Moss's Appeal, 83 Pa. 264 (1877); Thomson's Estate, 153 Pa. 332, 26 Atl. 652 (1893); Veech's Estate, 74 Pa. Super. 373 (1920), (1921) 69 U. OF PA. L. REV. 288. This rule followed the treatment accorded stock dividends under the rule of Earp's Appeal, 28 Pa. 368 (1857). See Evans, *Calculating the Distribution of a Stock Dividend between Life Tenant and Corpus* (1929) 77 U. OF PA. L. REV. 981; Notes (1926) 74 U. OF PA. L. REV. 618; (1928) 76 U. OF PA. L. REV. 589; (1935) 83 U. OF PA. L. REV. 773.

5. In Burton's Estate, 12 D. & C. 605 (Pa. 1929), the life tenant claimed stock purchased by the trustees by exercising stock rights, *less, however, the sum paid out of principal,* and was successful. Apparently, both sides took for granted that the *corpus* must first be reimbursed before distribution of the proceeds.

6. 290 Pa. 457, 139 Atl. 200 (1927), cited *supra,* note 4.

7. See Jones v. Integrity Trust Co., 292 Pa. 149, 153, 140 Atl. 862, 863 (1928).

8. This distribution would be as follows:

To *B*: Original 1300 shares @ $91.65 (originally @ $78.60)	$119,145
Reimbursement 188 shares @ $91.65	17,230
Total 1488 shares	$136,375
To *A*: 157 shares @ $91.65	$ 14,389

Compare *supra,* note 2.

9. See Wiltbank's Appeal, 64 Pa. 256, 259 (1870).

10. Buist's Estate, 297 Pa. 537, 147 Atl 606 (1929), (1930) 78 U. OF PA. L. REV. 570; RESTATEMENT, TRUSTS (1935) § 236 (e); see Graham's Estate, 198 Pa. 216, 220, 47 Atl. 1108, 1110 (1901); Nirdlinger's Estate, 290 Pa. 457, 479, 139 Atl. 200, 208 (1927).

Had the trustee sold the rights, or given them to the life tenant, the distribution suggested above would have resulted, and to permit the substantially similar transaction in this case affect the distribution seems inequitable.

Witnesses—Privilege of Newspaper Reporter to Refuse to Disclose Source of Information—A newspaper reporter refused to disclose to a grand jury investigating "policy rackets" the source of his information for a published newspaper article, which stated that despite investigation, the "racket" was continuing. Having been committed to prison for contempt, he petitioned for a writ of *habeas corpus*. *Held,* that the writ should be refused because the reporter had no privilege to refrain from testifying regarding confidential communications made to him. *People* ex rel. *Mooney v. Sheriff,* N. Y. L. J., Jan. 16, 1936, at 273 (N. Y. 1936).

The court, emphasizing the principle that, in general, public policy and the eradication of crime require a full disclosure of information known to witnesses,[1] wisely refused to make an exception when the end to be attained by the privilege not to testify was not more socially desirable than the purpose which supports the general rule.[2] The court was unwilling to extend to reporters the privilege granted to penal administrative officers, and as the privilege of the latter exists only to aid in the execution of penal laws,[3] this view appears to be correct.[4] To permit a reporter to refuse to reveal the source of his information after he has published accounts of criminal activity would tend to inspire public distrust of criminal administrative officials without assisting them to perform their duties. Of course, publicity given to criminal activities may encourage some police action, but in this situation the very instigator of the police then tends to obstruct them.[5] On the other hand, it is probable that sources of information will not be readily accessible to reporters unless strict confidence is observed,[6] which means that the reporter is faced with the alternative either of being subject to contempt proceedings or of suppressing all criminal news gathered from confidential sources. However, in view of the rarity of contempt proceedings against reporters for refusal to testify, and the questionable desirability of investigations of crime by private persons who refuse to cooperate in its prosecution, it would seem that the extension of the privilege to newspapermen would have been unwarranted.[7]

1. See 5 WIGMORE, EVIDENCE (2d 1923) § 2286. In Plunkett v. Hamilton, 136 Ga. 72, 84, 70 S. E. 781, 786 (1911), the court, discussing the privilege of a reporter, said: ". . . the law requires a witness to testify, when duly summoned before a court having jurisdiction, and called upon to give competent and relevant evidence. A promise not to testify when so required is substantially a promise not to obey the law. . . . To sustain such a doctrine would render courts impotent and the effort to administer justice oftentimes a mockery."

2. See Note (1912) 35 L. R. A. (N. S.) 583, 584.

3. See 1 GREENLEAF, EVIDENCE (16th ed. 1899) § 250; 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2374.

4. See Purrington, *An Abused Privilege* (1906) 6 COL. L. REV. 388. "Privilege, the exception of a person or class from the common rule, if not an abuse in its inception is proverbially sure to become one. The less there is of it under a reign of law the better."

5. However, a few states, by statute, grant this privilege to a newspaper reporter. See for example MD. ANN. CODE (Bagby 1914), Art. 35, § 2, "No person . . . employed on a newspaper . . . shall be compelled to disclose, in any legal proceeding . . . the source of any news or information procured or obtained by him for and published in the newspaper on and in which he is engaged, connected with or employed."

6. See Plunkett v. Hamilton, 136 Ga. 72, 81, 70 S. E. 781, 785 (1911), where the reporter testified that the effect of his disclosing the source of his information "would ruin me in my business. It would cause me to lose my position as a newspaper reporter . . . and would prevent my ever engaging in the occupation of a newspaper reporter again."

7. In the companion situation, where the accused had made a statement to a journalist, and objected to its admission on the ground that it was a confidential communication, the court, in People v. Durrant, 116 Cal. 179, 220, 48 P. 75, 86 (1897) overruled the objection as meriting scarcely any comment.